# Southwestern Bell Mobile Systems

November 5, 1993

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**Linds M. Hood** Attorney

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
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Washington, D.C. 20554

RE: GN Docket No. 93-252; Filing of Comments of Southwestern Bell Corporation

Dear Mr. Caton:

Enclosed for filing in the above referenced proceeding are the original and five copies of the Comments of Southwestern Bell Corporation. Please file these Comments among the papers in this proceeding.

Please return a file-marked copy of the Comments to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance.

Very truly yours,

Junda M. Hood

**Enclosure** 

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# BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C.

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In the Matter of	§ §	FCC - MAIL HOUM
Implementation of Sections 3(n) and 332 of the	§ §	GN Docket No. 93-252
Communications Act	§ §	
Regulatory Treatment of Mobile Services	<b>S</b> <b>S</b>	

# COMMENTS OF SOUTHWESTERN BELL CORPORATION ON NOTICE OF PROPOSED RULE MAKING

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Dated: November 8, 1993

# TABLE OF CONTENTS

			<u>Page</u>
TABL	E OF	CONTENTS	. i
SUMM	ARY		iii
I.	INTR	ODUCTION	. 1
II.		EMENTING DEFINITIONS OF COMMERCIAL AND PRIVATE LE SERVICES	. 3
	A.	Regulatory Parity And Streamlined Regulation Of Commercial Mobile Services Are In The Public Interest	. 3
	В.	Commercial Mobile Services Should Be Broadly Defined In The Interests Of Competition And Regulatory Parity	. 4
		<ol> <li>Service Provided For Profit</li> <li>Interconnected Service</li> <li>Public Availability</li> <li>Private Mobile Services</li> </ol>	. 5 . 6 . 9
	C.	Defining The Use Of The Spectrum	. 14
	D.	Classification Of Existing Services	. 15
	E.	Classification Of Personal Communications Services	. 17
	F.	Restrictions On Dispatch Over Commercial Frequencies And On SMR/EMSP Licenses Should Be Abandoned	. 21
		<ol> <li>SMR/EMSP Licenses</li></ol>	. 21
		Carrier Frequencies	. 25
III.		LATORY TREATMENT OF COMMERCIAL MOBILE ICES	. 25
	A.	The Commission Should Not Create Categories Of Commercial Mobile Services For Differing Regulatory Treatment	. 25

	В.	The Basic Guideline For Forbearance Should Be Competition As Evidenced By The Existence Of Two Or More Licensees In An
		Area
	c.	The Commission Should Forbear From Regulating Commercial Mobile Services 28
	D.	The Commission Should Not Mandate Interconnection Among Commercial Mobile Service Providers
	Ε.	Until All Commercial Mobile Service Providers Are Free Of Equal Access Obligations, All Providers Should Bear Those Obligations In The Interests Of Regulatory Parity
		Regulatory rurity
IV.	CONC	TUSTON

### SUMMARY

Southwestern Bell Corporation is vitally interested in the development of consistent and workable regulations for wireless services that will give all commercial mobile service providers the equal regulatory footing that is so needed in a competitive market. To that end, the Commission should adopt broad interpretations of the definitions of commercial mobile services and interconnected service that are not limited by capacity or geographic limitations. Cellular licensees, along with Personal Communications Services ("PCS"), Specialized Mobile Radio ("SMR") and Expanded Mobile Service Provider ("EMSP") licensees, will offer commercial mobile services that should receive comparable regulatory treatment.

The Commission should designate spectrum as available for either commercial or private use, while allowing commercial service providers to offer "sideline" private services on commercial frequencies, including allowing commercial or common carriers to offer dispatch services over commercial frequencies. At the same time, the Commission should lift the unjustified restriction on wireline telephone common carriers' ability to acquire SMR and EMSP licenses.

As a rule, the Commission need not separate commercial mobile service providers into discrete classes for differential regulatory treatment. Where there are at least two licensed providers of similar services that operate under the same set of rules and have licenses granted on the basis

of equal service area size (i.e. MSAs, RSAs, MTAs, BTAs), the Commission should forbear from imposing many of the traditional monopoly-based regulations of Title II of the Communications Act, such as tariffing obligations.

Until equal access can be eliminated as unnecessary for all commercial mobile service providers, including those affiliated with BOCs, all providers should adhere to those obligations. All of these services should be allowed to interconnect with LECs, and though the Commission should preempt the states on matters of the right to and types of interconnection required, it need not and should not require mandatory interconnection among commercial mobile service providers.

# BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C.

In the Matter of	S	
	S	
Implementation of Sections	<b>§</b>	
3(n) and 332 of the	<b>§</b>	GN Docket No. 93-252
Communications Act	§	
	<b>§</b>	
Regulatory Treatment of	§	
Mobile Services	§	

To: The Federal Communications Commission

## COMMENTS OF SOUTHWESTERN BELL CORPORATION

Southwestern Bell Corporation ("SBC"), on behalf of Southwestern Bell Mobile Systems, Inc. ("SBMS") and its other operating subsidiaries and affiliates, submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") released October 8, 1993, in the above-referenced matter.

#### I. INTRODUCTION

The Commission has before it in this proceeding a unique opportunity to revamp its regulatory structure to accommodate the realities of the wireless marketplace of today and tomorrow and to move toward parity and streamlining in the regulation of competitive wireless services. With the passage of the Budget Act<sup>1</sup> Congress has evidenced its intention that existing common carrier radio services, certain private radio

<sup>&</sup>lt;sup>1</sup>Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

services and future services, such as PCS, be brought within the regulatory arena of "commercial mobile services" so that all services identified on a practical and functional basis as commercial services will be subject to the same type of SBC supports Congress' efforts and urges the Commission to structure its regulations to create as simple and orderly a set of regulations as possible, including within the commercial mobile service category the broad array of existing and future wireless services that are available for sale to the public. These rules must be adaptable, not only in today's environment, but tomorrow's as well. The mobile services market is evolving and changing very rapidly, and unless the Commission adopts clear regulations, the ambiguity that exists today between common carriage and private carriage will only be perpetuated.

Congress has also given the Commission the statutory authority to eliminate the restriction on provision of dispatch services over common carrier service frequencies and to forbear from imposing on commercial mobile services those regulations that are not necessary to promote the public interest. The Commission should take advantage of that authority in both instances and should implement its tentative conclusions on regulatory forbearance.

# II. IMPLEMENTING DEFINITIONS OF COMMERCIAL AND PRIVATE MOBILE SERVICES

A. Regulatory Parity And Streamlined Regulation
Of Commercial Mobile Services Are In The
Public Interest

SBC seeks, as it always has, the twin goals of regulatory parity and streamlined regulation for competitive wireless services.2 The Commission's should also be working toward parity and streamlining, since its goal of ensuring that the public receives the benefits that flow from competition in the marketplace are best achieved when all competitors are given the same opportunities and obligations. Only complete regulatory parity and the streamlining and minimizing of regulation will ensure that providers are allowed to compete freely, unhampered by differing regulatory restrictions or unnecessarily restrictive regulation. With these goals in mind, many of the matters upon which the Commission requests comment can be readily resolved in favor of a consistent and pro-competitive system of regulation for mobile service providers.

<sup>&</sup>lt;sup>2</sup>See, e.g., Comments of Southwestern Bell Corporation, filed November 9, 1992, in Gen. Docket 90-314; In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services; and Comments of Southwestern Bell filed July 19, 1993, in Docket 93-144; In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Developments of SMR Systems in the 800 MHz Frequency Band (hereafter "SBC's EMSP Comments").

# B. <u>Commercial Mobile Services Should Be Broadly</u> <u>Defined In The Interests Of Competition And</u> <u>Regulatory Parity</u>

The Commission seeks comment on how to interpret the statutory definitions of commercial and private mobile NPRM ¶¶ 7, 10. Congress created this new services. regulatory classification system for mobile services in recognition of the changing wireless environment in which traditional concepts of common carriers and private radio carriers no longer always make sense, and out of a desire to promote competitive market conditions for wireless services. One of the developments driving the need for this new system was the evolution of previously private type services into interconnected services being offered to a substantial segment of the population. Another development is the coming licensing of PCS, which do not have an existing regulatory classification, yet which will compete with existing commercial type services. The objective therefore is to bring regulatory parity to these services that compete with each other regardless of how they may have been classified in the past.

In furtherance of that objective, the Commission should adopt a broad view of what constitutes a commercial service and a relatively narrow view of what constitutes a private service. In today's wireless marketplace, the basic types of services that ought to be considered private are those that are used for internal purposes by the licensee itself or that

are used by governmental or public safety entities. Most any other service will bear attributes of a commercial service, and if the past evolutionary (or revolutionary) developments in wireless technology are any indication for the future, then most of these services either already do compete or will move toward competing with other publicly offered services and are therefore appropriate for classification as commercial services.

It is against this background that the Commission must examine the individual elements of the statutory definition of a commercial mobile service: any mobile service that is provided for profit and makes interconnected service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public.<sup>3</sup>

### 1. Service Provided For Profit

Perhaps the simplest element of "commercial mobile service" to deal with is that it must be provided for profit. See NPRM ¶¶ 11-13. There should be no disagreement that this element does not require that a licensee actually turn a profit at any point in time - only that the intention be to eventually make a profit, as evidenced by provision of a service for which compensation is received. This effectively excludes services provided by governmental entities and wholly internal services that a licensee provides for its own use.

NPRM ¶ 11. A licensee who operates a system for internal use

<sup>&</sup>lt;sup>3</sup>42 U.S.C. § 332(d)(1).

but also makes excess capacity available on a for-profit basis should be deemed to be providing for-profit (and potentially therefore commercial) service to the extent of the excess capacity sold.

The test for a "for-profit" service should be based on whether the service as a whole is provided for a fee or on a for-profit basis. Thus, to use the Commission's example from paragraph 12 of the NPRM, even if a provider claims that the "interconnected portion" of its service is being offered on a non-profit basis (i.e. is not being marked up), if the provider sells the overall service to subscribers for a fee with the intent of profiting, the service is provided for profit. The test is not whether any particular piece of the transmission can be said not to be marked up or sold for a profit, but whether the entire service meets that criterion. This is clear from the statutory definition of commercial mobile service, which states that the mobile service itself must be provided for profit, and that it also makes interconnected service available. It does not state that the interconnected service portion must be a separate source of profit.

#### 2. Interconnected Service

The Commission should construe "interconnected service" expansively. Because any service that is interconnected to the Public Switched Telephone Network ("PSTN") has the capability of reaching any other point on the PSTN, any

service that interconnects with the PSTN<sup>4</sup> meets this test. Contrary to the suggestions in paragraphs 16 and 20 of the NPRM, it does not matter whether end users themselves can achieve dial tone or make direct dialed calls to any point on the PSTN since they can get there through the service, even if they have to go through the service's operator. Although access to the PSTN is under the exclusive control of the licensee, the system makes available interconnected service and can utilize the switching functions of the PSTN. Accordingly, store-and-forward technologies such as those described in NPRM ¶ 21 would meet this definition of "interconnected service."

A service is not necessarily interconnected simply because it leases dedicated facilities from a LEC, however, since the mere running of traffic over that line lacks the "switched" element of access to the public switched network. A trunk running from point A to point B over which a mobile service provider sends its traffic with no switching directions coming from the PSTN would not meet the requirements for interconnected service, absent some other part of the system interconnecting with the PSTN.

<sup>&</sup>quot;The Commission seeks comment on whether the term "public switched network" used in the definition of "interconnected service" should be given the same meaning as the traditional PSTN. NPRM ¶ 22. The answer is yes. There is no need for an additional construct here for the telecommunications industry to operate efficiently with various services all interconnecting through the central hub of the PSTN. And there is no indication that Congress intended a more expansive meaning to be attached to this term.

A significant advantage of a broader definition of interconnected service that would bring services like Automatic Vehicle Monitoring ("AVM") within the commercial category, is that such services will not need to continually reexamined to determine when and whether they have reached a state of development that they might meet a more restrictive definition of interconnected service and therefore have become commercial rather than private. It is likely that services like AVM will evolve over time to encompass more and diverse applications. The Commission should encourage that development and diversification. By and large the development of emerging wireless technologies is for sale to a public or some segment thereof, and the Commission should adopt a simple framework that recognizes the essentially regulatory commercial nature of all of these technologies. designation of "private" should really be reserved for that narrow class of services that is truly provided for wholly internal purposes by the licensee or that is provided by a governmental or public safety entity. By initially

<sup>&</sup>lt;sup>5</sup>SBMS is an active participant in the evolving market for AVM and Location and Monitoring Services ("LMS") and expects to contribute to the diversity in development of these services. It has received experimental authorization to provide LMS in Chicago, Illinois and expects to receive permanent authority soon. It has also participated in the Commission's Docket proceedings on AVM and LMS. See Comments of Southwestern Bell Corporation filed July 24, 1992, RM 8013; and Comments of Southwestern Bell Mobile Systems, Inc., filed June 29, 1993, in PR Docket No. 93-61, In the Matter of Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems.

classifying most other services as commercial, they can develop without additional consideration of their regulatory status.

## 3. Public Availability

Services are effectively available to a substantial portion of the public regardless of eligibility limitations so long as such services are available to a large sector of the public as end users. For example, the eligibility rules of SMR and "private" paging do not effectively exclude a very large portion of the public, and should therefore be considered available to the public. NPRM ¶ 24.

Regardless of whether the class of users is described as a broad or narrow one, a service is commercial if it is effectively available to a substantial portion of the public. A service provider should not be able to claim that it is not providing public service merely by offering it through customized or individual negotiation rather than individually. Further, a carrier cannot avoid a designation as a commercial carrier by funneling its service through a reseller (however designated), then claiming that all of its sales are made to a single entity. The question is the scope of the ultimate end users of the service. Likewise, if the Commission concludes that shared systems should be considered private it will have to scrutinize those systems carefully to determine whether they are truly shared or whether there is a service

<sup>&</sup>lt;sup>6</sup>47 U.S.C. 332(d)(1).

being provided to multiple end users by an entity being paid for the service.

Whether a service is available to the public does not depend on the actual number of people that a system can of system or geographic accommodate, either because limitations, or on the number of people who ultimately subscribe to the service. The key should be how the class of authorized users stacks up against the public at large. Any individualized rule will require and possibly other inconsistent decisions about when a system is "big" enough to be considered commercial. The same system, under that rule, might flip back and forth between being commercial and private while continuing to provide service to the same class of eligible users. That does not make sense and will not work from a regulatory point of view.

The Commission repeatedly refers to the portion of the public "served" by a system, when in fact what matters is how and to whom the service is made available - not who is actually being served. All systems have some sort of geographic limitation imposed by their licenses or loading requirements, and all sorts of limitations based on technological variables and economic and market conditions. The number of people to whom cellular service is available and who could actually be served in a small RSA is smaller than the number of people to whom service is available and who could actually be served in a large MSA, but the service

itself is still commercial in the RSA because it is open to all classes of people in that RSA and hence to the "public." These differences in capacity or geography do not alter a service's commercial nature.

The Commission needs to bear in mind that it is trying to develop a set of clean, workable and streamlined rules that afford regulatory parity to competitive services. In the past, as the Commission notes, it has not considered capacity limitations in determining how to regulate common carrier mobile services, and it would unreasonably and unnecessarily complicate and skew the new streamlined classification and regulatory scheme the Commission is creating to consider those limitations in determining the commercial or private character of an otherwise commercial service. Repeated considerations of whether a particular carrier's service is commercial or private based on size or capacity changes would not be a productive use of Commission resources, nor would it be in the public interest.

#### 4. Private Mobile Services

The Commission requests comment on two possible interpretations of the definition of private mobile services.

NPRM ¶¶ 29-31. The only interpretation of private mobile services consistent with both the plain meaning of the statute and Congress' intent is that put forth in paragraph 31 of the NPRM, which requires that if a service is either (1) a commercial mobile service in accordance with that definition

or (2) a functional equivalent of services that fall within the definition of a commercial mobile service, then it cannot be a private mobile service. If a service meets the requirements of either (1) or (2) above, then it must be a commercial mobile service. Further, as the Commission points out, this is consistent with the Conference Committee's statement that it amended the definition of private mobile services to make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service.

The alternative interpretation advanced by the Commission in paragraph 29 of the NPRM does not make much sense and requires a reading of the statute that is strained at best. Although the Commission describes this interpretation as classifying a service as private "if (1) it fails to meet the statutory definition of a commercial mobile service, or (2) it is not the functional equivalent of a commercial mobile service," a more accurate statement of this interpretation is that a service is private unless it both meets the statutory definition of a commercial mobile service and is

 $<sup>^{7}</sup>$ Section 332(d) of the Communications Act defines the term "private mobile service" as "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."

 $<sup>^{8}</sup>$ H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993), at 496 (cited by the Commission at NPRM ¶ 31).

<sup>&</sup>lt;sup>9</sup>NPRM at ¶ 29.

also the functional equivalent of a commercial mobile service. The suggestion is that a service could fit the definition of a commercial mobile service, yet be classified as private because it is somehow not the functional equivalent of a commercial mobile service. Aside from the fact that this is not what the statute says, this interpretation presents a problem in that it assumes that a commercial service is not in fact defined by its own definition but by some other "essence of commerciality" and if that something else is lacking, a service might be private. If that were the case, then there wouldn't really be a category of commercial mobile services -only "functional equivalents" of commercial mobile services, whatever those are. It is simply not workable to have the baseline for what constitutes a commercial (and therefore not a private) service be something other than the statutory definition of a commercial mobile service.

Use of the same test for "functional equivalence" that has been used in discrimination cases and is described at paragraph 33 of the NPRM is not feasible insofar as its linchpin is consumer perception. In a discrimination case, you have an individual consumer or group of consumers complaining about a particular service being offered to others on a discriminatory basis. In that context it may make sense to inquire how that consumer or group of consumers views the services in question, and whether it views them as roughly equivalent services. In the broader context of classifying

services at large, it is difficult to even know which consumer's perceptions to gauge, and then there is no reliable way to gauge it.

The concept of frequency reuse or coverage of a wide geographic area is completely inappropriate for determining functional equivalence. That would simply be a back door way of importing into the definition of a commercial service a requirement that is not and should not be there to begin with. As discussed below, a service will fall within the category of commercial service even if it does not employ frequency reuse or cover an area as big as an MTA or BTA. Since commercial services themselves do not require those attributes, their "functional equivalents" do not require those attributes.

### C. Defining The Use Of The Spectrum

SBC proposes that wherever possible the Commission designate particular spectrum as available for use by either commercial mobile services or private mobile services. is consistent with past practice under the common carrier/private carrier dichotomy, and furthers the goal of clarity and simplicity of regulation. Thus, a carrier applying for a license using spectrum that has been designated for commercial service will know that its service, to the extent that it does not fall under other existing specialized regulations, such as those for cellular, will at the least be subject to regulation as a commercial mobile service and it will need to offer the service to the public.

If the Commission does not want to relocate existing services (and SBC does not advocate that it do so), then to the extent that there is currently spectrum designated as private being used to offer commercial mobile services, such spectrum should be designated as available for either commercial or private use.

In connection with this proposed regulatory plan, a commercial carrier should be allowed to offer private services on the same spectrum as its commercial service, but only as a sideline to the primary commercial service being offered under the license. A commercial licensee would not be regulated as a common carrier to the extent of its private activities, but those private activities must not interfere with the licensee's obligations as a common carrier or with its ability to meet build out requirements or service obligations to the public. This scheme would allow, for example, cellular carriers to offer dispatch services over their cellular frequencies to the extent that the Commission still classifies dispatch as private.<sup>10</sup>

### D. <u>Classification Of Existing Services</u>

SBC agrees with the Commission that services provided by a licensee solely for its internal use should be classified as private services, as should services provided by governmental and public safety entities. NPRM ¶ 35. Existing commercial

<sup>&</sup>lt;sup>10</sup>Note, however, that under an appropriately broad interpretation of an interconnected service, dispatch may well be considered a commercial service anyway.

mobile services include cellular, SMR (EMSP), AVM and paging.

Wide area SMR service is interconnected and available to a "substantial portion of the public" and like cellular should be classified as commercial. If the Commission issues licenses to SMR applicants at 800 and 900 MHz to provide wide Mobile service (e.g. Expanded Service Providers ("EMSPs")) those services should be classified as commercial as well. At least three wide area regional SMR providers -Nextel, Dial Page and Cencall - have been rapidly expanding their number of SMR channels both within and adjacent to their service areas through mergers, acquisitions and alliances. These operators' stated intention is to convert their SMR properties into enhanced SMR to offer cellular-like service.

Likewise, traditional SMR or dispatch service if it is interconnected as described above, should be classified as commercial. Even if not interconnected, any competing service should be classified as commercial if it meets the relevant test for functional equivalence of commercial service. example, if a service like that provided by RAM Mobile Data a wide area data service at 900 MHz that is not physically interconnected with the PSTN - offers service for profit to a substantial portion of the public, it should be considered the functional equivalent of a commercial mobile service and therefore subject to regulation as a commercial mobile service. Wide area providers who devote the majority of their system capacity to traditional dispatch services to

specialized user groups such as railroads, utilities or the trucking industry should be considered commercial to the extent that any company desiring such dispatch services can acquire them from the service provider.

Pending licenses for Automatic Vehicle Monitoring, including those of SBMS, should be classified as commercial and will be if the Commission adopts the definition of interconnected service advocated herein, since those systems would have access to the switching functions of the PSTN, even though end users themselves might not be able to directly access all points on the PSTN.

Finally, private carrier paging should be classified as commercial, since the store and forward technology it uses meets the test for interconnected service advocated above. This is consistent with Congress' intent that at least some PCPs would be reclassified as commercial, as evidenced by its explicit grandfathering of such services for three years after enactment of the Budget Act.

## E. <u>Classification Of Personal Communications</u> Services

As the Commission correctly observes, one of Congress' primary objectives in revising Section 332 was to ensure that PCS would be regulated as commercial. NPRM ¶ 45. This is reinforced by the fact that Congress clearly intended PCS licenses to be auctioned, and the only spectrum statutorily subject to auction is that spectrum whose use will involve, or is reasonably likely to involve, the licensee receiving

compensation from subscribers. It is further buttressed by the Commission's imposition of build-out requirements for both narrowband and broadband PCS, which will require licensees to provide some form of broadly available service in their license areas - requirements that are completely inconsistent with the regulation of private services.

Although the Commission expresses concern that categorizing PCS may unnecessarily restrict the diversity of potential PCS applications (NPRM ¶ 45), in fact the reverse is Under SBC's proposal to allow commercial licensees to true. provide sideline private services and to have those services regulated as private, there will be ample opportunity for experimentation with private applications of PCS while simultaneously accomplishing Congress' desire to bring this next generation of wireless services to market for the benefit of the public. All that this system of classification would prevent is a carrier coming forward and desiring to provide on the PCS spectrum a wholly or primarily private service essentially one provided for that carrier's own internal use and this prohibition is consistent with the underlying concept of PCS. It would be an inefficient use of a scarce national resource to allow spectrum designated for PCS to be set aside for private services.

Furthermore, such private use would not fit into the auction scheme now being proposed. How would a private PCS provider acquire a license? Not through auction, since the

Commission lacks the authority to auction spectrum that will be used for internal, not for profit purposes. How then would the Commission determine whether to grant that carrier a license? Would it be required to set aside enough spectrum to accommodate all those providers desiring to provide private services? Surely not. Congress never anticipated that the PCS spectrum would be divided up among commercial and private And why would the Commission have found it services. necessary to impose a qualification requirement in all instances on cellular carriers, prohibiting them from holding PCS licenses in their own cellular service areas, if they might actually be seeking the license for а application that would not pose any alleged competitive threat?

The Commission suggests that PCS providers might be allowed to offer both commercial and private services on a "co-primary basis." In accordance with its previously proposed regulatory scheme, SBC concurs to the extent of allowing a PCS provider (which must be primarily a provider of commercial service) to offer a sideline private service under the same license, subject to the provisos that such private service not interfere with provision of the commercial service or substantially diminish the capacity available to the public. This ensures that PCS will be broadly available to

<sup>&</sup>lt;sup>11</sup>This type of rule would be consistent, for example, with auxiliary services offered under cellular licenses. <u>See</u> 47 C.F.R. § 22.930; and Gen. Docket 87-390, In the Matter of